

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
WAIKOLOA WATER CO., INC., WAIKOLOA)
SANITARY SEWER CO., INC., WAIKOLOA)
RESORT UTILITIES, INC., and HAWAII)
WATER SERVICE COMPANY, INC.)
)
Requesting Approval of (a) the Sale)
of the Stock of Waikoloa Water Co.,)
Inc., Waikoloa Sanitary Sewer Co.,)
Inc., and Waikoloa Resort Utilities,)
Inc., to Hawaii Water Service)
Company, Inc., Pursuant to Hawaii)
Revised Statutes §§ 269-17.5 and)
269-18; and (b) Financing)
Arrangements pursuant to Hawaii)
Revised Statutes § 269-17.)

DOCKET NO. 2008-0018

ORDER NO. 24162

Filed April 23, 2008
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii

Karen Higashi

RECEIVED
2008 APR 24 A 8:19
DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
WAIKOLOA WATER CO., INC., WAIKOLOA)
SANITARY SEWER CO., INC., WAIKOLOA)
RESORT UTILITIES, INC., and HAWAII)
WATER SERVICE COMPANY, INC.)
)
Requesting Approval of (a) the Sale)
of the Stock of Waikoloa Water Co.,)
Inc., Waikoloa Sanitary Sewer Co.,)
Inc., and Waikoloa Resort Utilities,)
Inc., to Hawaii Water Service)
Company, Inc., Pursuant to Hawaii)
Revised Statutes §§ 269-17.5 and)
269-18; and (b) Financing)
Arrangements pursuant to Hawaii)
Revised Statutes § 269-17.)

Docket No. 2008-0018

Order No. 24162

ORDER

By this Order, the commission instructs WAIKOLOA WATER CO., INC., WAIKOLOA SANITARY SEWER CO., INC., WAIKOLOA RESORT UTILITIES, INC. and HAWAII WATER SERVICE COMPANY, INC. (collectively, "Applicants") to file redacted versions of their (1) Exhibit E to the Application (Transaction A Stock Purchase Agreement); (2) Exhibit F to the Application (Transaction B Stock Purchase Agreement); and (3) Response No. 10 of Applicants' Responses to the Consumer Advocate's First Submission of Information Requests (specifically, the attachment to Response No. 10, the Phase I Environmental Assessment), that publicly disclose the information that is not subject to confidential protection, while retaining under seal the information Applicants believe should be subject to confidential protection pursuant to Protective Order No. 24049, filed

on February 20, 2008 ("Protective Order No. 24049"). For the information Applicants continue to designate as confidential, they, in their transmittal letter, shall abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 24049.

I.

Background

On January 31, 2008, Applicants submitted their Application, Exhibits A through I, Verifications of Thos Rohr and Martin A. Kropelnicki, and Certificate of Service ("Application"). Exhibits E and F were omitted from the Application. The Application states:

[Waikoloa Land & Cattle Co. ("Waikoloa Land")] and [Hawaii Water Service Company, Inc. ("HWSC")] have entered into a Stock Purchase Agreement dated December 20, 2007 (the "Transaction A Agreement"), pursuant to which HWSC will purchase all of the issued an[d] outstanding shares of stock of [Waikoloa Water Co., Inc.] and [Waikoloa Sanitary Sewer Co., Inc.] from Waikoloa Land for \$1,500,000.00. A copy of the Transaction A Agreement will be submitted as confidential **Exhibit E** once a protective order is in place.

Waikoloa Development [Co.] and HWSC have entered into a Stock Purchase Agreement dated December 20, 2007 (the "Transaction B Agreement"), pursuant to which HWSC will purchase all of issued and outstanding shares of stock of [Waikoloa Resort Utilities, Inc. ("WRU")] from Waikoloa Development [Co.] for \$6,300,000.00. A copy of the Transaction B Agreement will be submitted as confidential **Exhibit F** once a protective order is in place.

...

Application, at 6 (emphasis in original).

On February 20, 2008, the commission issued Protective Order No. 24049, which approved the Stipulation for Protective Order submitted by Applicants and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules § 6-61-62(a). Based on the protective order, on February 22, 2008, Applicants submitted a letter transmitting, under confidential seal, Exhibits E and F to the Application.

On April 1, 2008, Applicants submitted their Responses to the Consumer Advocate's First Submission of Information Requests ("Applicants' Response to IRs"). In response to the Consumer Advocate's Information Request No. 10, Applicants submitted a document entitled Phase I Environmental Assessment as confidential pursuant to Protective Order No. 24049.

II.

Information Designated as Confidential

Protective Order No. 24049 "governs the classification, acquisition, and use of trade secrets and other confidential information produced by any party in this docket."^{1,2} Paragraphs Nos. 4, 5, and 8 of Protective Order No. 24049, state:

¹Protective Order No. 24049, Ordering Paragraph No. 1, at 2.

²Protective Order No. 24049 is subject to the Uniform Information Practice Act ("UIPA"). Paragraph 3 states:

4. A party to this proceeding may designate as confidential any information it believes, in good faith, contains trade secrets or other confidential research, development, commercial, financial, vendor, or bid information, including but not limited to cost support studies. Such information shall be protected against disclosure to a non-qualified person pursuant to the terms of this protective order, unless such information is declassified, or permission to disclose the information to such non-qualified person is granted by the party claiming confidentiality, as provided in paragraph 13 below. In addition, a party may designate certain information as being confidential and not to be distributed to another party (not including the Consumer Advocate) by notifying the Commission and the Consumer Advocate in writing setting forth in particularity the information to be kept as confidential and not available to the other party. With respect to such confidential information, the party to whom such information is being withheld shall be treated as a non-qualified person from whom such information shall be protected against disclosure in accordance with the terms of this protective order.

5. If a party designates information as confidential pursuant to paragraph 4 above or 6 below, it shall produce the confidential information in accordance with the procedures described in paragraphs 11 through 14 below, and concurrently provide certain information in writing to the Commission and the Consumer Advocate. If a party seeks to designate information as confidential, it must: (1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing party from any misuse or

To the extent that any of the documents covered by this protective order consist of "government records," as defined in [HRS] § 92F-3, the provisions of HRS Chapter 92F [UIPA] shall apply to the disclosure of information contained in such documents. In the event any provision of this protective order conflicts with any provision of the UIPA, the UIPA shall control.

Protective Order No. 24049, Paragraph No. 3, at 3.

unpermitted disclosure of the information. If the Commission or any party challenges the claim of confidentiality of the information, the party claiming confidentiality shall bear the burden of proof in supporting its claim of confidentiality, and the Commission will determine whether the information is confidential and whether it should be disclosed under a protective order. Any challenge to the confidentiality of any information shall be made in accordance with paragraph 24 below.

. . . .

8. Any party claiming that information is confidential shall place upon the applicable material the following legend:

**CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of a document, transcript, or other material is deemed to contain confidential information, the party shall, to the extent reasonably practicable, limit the claim of confidentiality to only such portion. However, if such limitation is not reasonably practicable, the entire document, transcript, or other material may be designated as confidential information.

Protective Order No. 24049, Paragraphs Nos. 4, 5, and 8, at 3-5 (emphasis added).

In submitting Exhibits E and F under confidential seal, Applicants state, without further explanation, that "subject to Protective Order No. 24049, [Applicants] hereby respectfully submit Confidential Exhibits E and F to the Application requesting approval of (a) the sale of the stock of the Waikoloa Utilities to HWSC; and (b) financing arrangements, which [were] filed herein on January 31, 2008."³ Also, in Applicants'

³Applicant's Confidential Exhibits E and F to Application, filed on February 22, 2008.

Response to IRs, No. 10, Applicants submitted the Phase I Environmental Assessment as a "confidential attachment."

Here, the commission notes that Applicants submitted their entire stock purchase agreements as Exhibits E and F, approximately 95 and 90 pages, respectively,⁴ as well as the Phase I Environmental Assessment, approximately 74 pages. Every page is stamped at the bottom with the words, "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER."⁵ Most notably, Applicants, in designating the entire agreements and Phase I Environmental Assessment as confidential, do not "(1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information[,]" as required by Paragraph No. 5 of Protective Order No. 24049. The requirement that the producing party meet these specific factors is necessary for the commission to determine whether the information filed under seal by the Applicants constitutes confidential information that, if publicly disclosed, will cause cognizable harm to the producing party.

In addition, Applicants chose not to file redacted versions of the documents, which is permissible under Paragraph No. 8 of Protective Order No. 24049, to the extent

⁴Applicant's Confidential Exhibits E and F to Application, filed on February 22, 2008.

⁵Applicant's Confidential Exhibits E and F to Application, filed on February 22, 2008.

reasonably practicable. In essence, in the commission's view, these documents do not appear to be confidential in their entirety, and it is reasonably practicable for the Applicants to produce redacted versions of these documents.

For these reasons, the commission instructs the Applicants to file redacted versions of their Exhibits E, F, and the Phase I Environmental Assessment that are not subject to confidential protection, while retaining under seal the information Applicants believe should be subject to confidential protection pursuant to Protective Order No. 24049. For the information which Applicants continue to designate as confidential, in their transmittal letter, Applicants shall abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 24049.

III.

Orders

THE COMMISSION ORDERS:

By April 24, 2008, Applicants shall file redacted versions of their (1) Exhibit E to the Application (Transaction A Stock Purchase Agreement); (2) Exhibit F to the Application (Transaction B Stock Purchase Agreement); and (3) Response No. 10 of Applicants' Responses to the Consumer Advocate's First Submission of Information Requests (Phase I Environmental Assessment), that publicly disclose the information that is not subject to confidential protection, while retaining under seal the information Applicants believe should be subject to

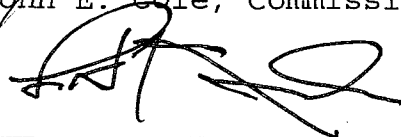
confidential protection pursuant to Protective Order No. 24049, filed on February 20, 2008. For the information which Applicants continue to designate as confidential, they shall, in their transmittal letter, abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 24049, filed on February 20, 2008.

DONE at Honolulu, Hawaii APR 23 2008.

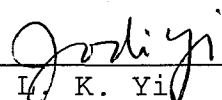
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Jodi L. K. Yi
Commission Counsel

2008-0018.eh

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the foregoing Order No. 24162 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

WAIKOLOA WATER CO., INC.
WAIKOLOA SANITARY SEWER CO., INC.
WAIKOLOA RESORT UTILITIES, INC.
c/o Waikoloa Development Company
150 Waikoloa Beach Drive
Waikoloa, HI 96738

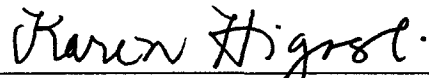
JOHN S. TOOLE, ESQ.
HAWAII WATER SERVICE COMPANY, INC.
c/o California Water Service Group
1720 North First Street
San Jose, CA 95112

BRUCE D. VOSS
BAYS DEAVER LUNG ROSE & HOLMA
1099 Alakea Street, 16th Floor
Honolulu, HI 96813

Counsel for Waikoloa Utilities

J. DOUGLAS ING
PAMELA J. LARSON
LISA S. HIRAHARA
WATANABE ING & KOMEIJI LLP
First Hawaiian Center, 23rd Floor
999 Bishop Street
Honolulu, HI 96813

Counsel for Hawaii Water Service Company, Inc.



Karen Higashi

DATED: APR 23 2008